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New Institutions for Worker Representation in the United States: Theoretical Issues

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NEW INSTITUTIONS FOR WORKER REPRESENTATION IN THE UNITED STATES: THEORETICAL ISSUES

BY ALAN HYDE*

I. INTRODUCTION

Labor union membership continues to decline in the United States, especially in the private sector.¹ Meanwhile, in the last decade or so, several new organizations that advocate for working people have emerged. I will discuss many of these groups, using the term Alternative Worker Organization (AWO) to refer to all of them. The common feature that sets AWOs apart from traditional labor unions is that they function more like social movements than traditional unions. Although influential, no one type of AWO is numerically large or dominant, even in a particular industry or firm. The safest short-term prediction is that, over the next decade at least, United States labor law will have to accommodate a wide variety of different emerging institutions and movements of worker representation.

This article proposes that all of these organizations contribute something important to the labor and organizing movements, and that these contributions will need to be considered by policymakers. The same will be true of even newer organizations that have yet to emerge. However, my tentative conclusion is that AWOs will not become dominant in any particular industry or location because they face two particularly large obstacles. First, AWOs have yet to appeal to a really substantial number of working people whose pre-existing attitudes dispose them against union membership.² Second, the alliances necessary for survival of AWOs include groups with sharply varying agendas that often put little importance on the

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1. Unions represent 12.5% of the overall U.S. workforce and only 7.9% of the private sector. The private sector rate is half the rate that it was in 1983, when the current data series began. See Press Release, U.S. Dep't of Labor, Union Members Summary (Jan. 27, 2005), <http://www.bls.gov/news.release/union2.nr0.htm>.

2. See Sharon Rabin-Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause for Labor's Decline*, 16 HOFSTRA LAB. & EMP. L.J. 133 (1998).

construction of enduring organization.³ On the other hand, I will show that some defects that others have identified are exaggerated. AWOs do not appear to face any unique problems in collective action, or projecting power. Part II of this article reviews some recent AWOs in the United States. Part III briefly discusses the legal framework for their regulation. Part IV discusses theoretical issues relating to unique challenges of the AWOs. Do AWOs face collective action problems distinct from those faced by traditional unions? Do AWOs have unique difficulties in projecting power and attaining results? Will the alliances necessary to the growth of AWOs impede their effectiveness for employees?

Based on the achievements of AWOs to date, there does not appear to be any compelling policy reason for the law to channel workers into one type of organization rather than another, or provide incentives such as a representational monopoly to particular types or forms of organizations — as opposed to any organization that enrolls a majority. The guiding legal principles should be tolerance of organizational diversity and pluralism, and the maintenance of basic values of democracy and organizational responsiveness.

II. THE CURRENT ORGANIZATIONAL LANDSCAPE IN THE UNITED STATES

It is difficult to present a coherent picture of emerging nonunion institutions of worker advocacy since many forms compete; there are no legal definitions of any, and no scholarly consensus about how to define or classify them. This article will deal with eight types of AWOs; however, this list should not be considered complete because the groups will change over time. The list and classifications will be revised many times, both by myself and by others. I include organizations that actually exist (as opposed to the theoretical); that articulate and organize concerns of workers (all terms have been defined broadly and non-technically); and do

3. See Alan Hyde, *Who Speaks for the Working Poor?: A Preliminary Look at the Emerging Tetralogy of Representation of Low-Wage Service Workers*, 13 CORNELL J.L. & PUB. POL'Y 599 (2004).

not themselves attempt to earn a profit.⁴ I follow Richard Freeman and Joni Hersch in distinguishing “membership” from “nonmembership” organizations.⁵ To this pair, I add spontaneous or inchoate protests that do not seem to fall well into either “membership” or “nonmembership” organizations. The eight types of AWOs worth discussing under this definition are:

Membership Organizations:

1. Membership organizations affiliated with labor unions, such as, Working America,⁶ Washington Alliance of Technical Workers (WashTech/CWA),⁷ Alliance@IBM, Restaurant Opportunities Center, and Working Partnerships.
2. Employee caucuses, which are membership groups typically sponsored by employers.
3. Working Today.⁸

4. Some for-profit temporary help agencies not only help find work for individual clients, but also advocate for their individual clients on the job, provide job counseling, assist with resume writing and interview skills, and train. In Silicon Valley, temporary help agencies have successfully urged corporate customers to raise salaries to prevailing levels, and assisted in the removal of managers whose harsh attitudes were affecting recruiting. ALAN HYDE, *WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH-VELOCITY LABOR MARKET 147-50* (2003); Esther B. Neuwirth, “Silicon Valley Temps”: An Ethnographic Account of the Staffing Industry (2002), http://www.iir.ucla.edu/research/grad_conf/2002/neuwirth.pdf. It does not strain credulity to describe such temporary help agencies as a kind of AWO, albeit one run for profit. If the temporary help agency is considered a worker organization, it may be the most successful new model in the United States economy. While only 2.2 million workers worked for temporary help agencies in 2002, the sector is projected to grow rapidly over the next decade, see U.S. Dep’t of Labor, Employment Services, www.bls.gov/oco/cg/cgs039.htm (last modified Feb. 27, 2005). This paper will not provide a detailed discussion of proprietary temporary help agencies. However, their existence represents the major competition for some of the organizations that will be discussed, such as the benefits provider Working Today, and the unsuccessful temporary help agency run for a time by the Working Partnerships project of the South Bay Labor Council in San Jose, California.

5. EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 2 (Richard B. Freeman, Joni Hersch & Lawrence Mishel eds., 2005) [hereinafter EMERGING].

6. See Lauren Snyder, Organization Profile, *Working America*, 50 N.Y.L. SCH. L. REV. 589 (2005-2006).

7. See Danielle D. van Jaarsveld, *Insights from the Temporary Agency Workforce: Overcoming Obstacles to Worker Representation*, 50 N.Y.L. SCH. L. REV. 355 (2005-2006).

8. See Sarah N. Kelly & Christine Tramontano, Organization Profile, *Working Today*, 50 N.Y.L. SCH. L. REV. 597 (2005-2006).

Nonmembership Organizations:

4. Immigrants' advocacy organizations, such as Casa Mexico, Domestic Workers United, and Immigrants Support Network.⁹
5. Immigrants' centers, such as the Workplace Project.¹⁰
6. Legal advocacy groups, such as National Employment Law Project,¹¹ Puerto Rican Legal Defense and Education Fund, and New York University School of Law Immigrants' Rights Clinic.
7. Governmental agencies that advocate for workers, such as New York State Attorney General and New York City Council.

Spontaneous Protests with Limited Formal Organization:

8. Intranet and Internet-based protests, such as the pension rights protest at AT&T and IBM, and the bonus policy protest at Apple Computer.

None of the definitions are rigorous and all distinctions among them are somewhat factitious. Real-world advocacy campaigns often involve joint action among groups from several categories.¹² While Part II is descriptive, it will be clear that, in general, AWOs are surprisingly effective at motivating group action and achieving results often beyond the reach of traditional unions. However, they have difficulty sustaining organization, and have complicated relations with allies — specifically, legal and governmental actors and traditional unions. Part III briefly discusses their legal status in United States labor law. Part IV discusses theoretical issues relating to their stability and effectiveness.

9. See Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L. SCH. L. REV. 465 (2005-2006); Rosanna M. Kreychman & Heather H. Volik, Organization Profile, *Immigrant Workers Project of the AFL-CIO*, 50 N.Y.L. SCH. L. REV. 561 (2005-2006).

10. EMERGING, *supra* note 5. See Emily Stein, Organization Profile, *The Workplace Project*, 50 N.Y.L. SCH. L. REV. 607 (2005-2006).

11. See Joshua N. Leonardi, Organization Profile, *The National Employment Law Project*, 50 N.Y.L. SCH. L. REV. 579 (2005-2006).

12. See Hyde, *supra* note 3 (describing campaigns involving unions, immigrant advocacy groups, legal advocacy groups and governmental representatives, either in cooperation or competition).

A. Membership Organizations

1. Membership Organizations Affiliated with Labor Unions

United States labor union practice extends union membership only to those actively working at worksites where unions represent them, and perhaps also to retired employees.¹³ Unions traditionally did little to stay in touch with members who left union work, or moved to other regions of the country with lower union density; membership was tied to the specific employment.¹⁴

Unions have recently developed several affiliated organizations that directly enroll members but do not bargain for them collectively or otherwise deal with employers on their behalf. These have been organized by the national federation itself (AFL-CIO); international unions (Communication Workers); a central labor council (Working Partnerships); and a local union (Hotel and Restaurant Workers in New York City). All attempted to create different types of movements that will remain affiliated with the sponsoring labor union.

The AFL-CIO has created Working America, "A Community Affiliate of the AFL-CIO."¹⁵ Working America is a membership organization of individuals who affiliate with the labor movement but are not members of any particular union or represented by one for purposes of collective bargaining. Until now, Working America has only been used as a get-out-the-vote vehicle. Early efforts focused on residents of working-class neighborhoods in states anticipated to be in play during the 2004 presidential election, that is, Ohio, Missouri, and Florida. Door-to-door organizers signed up members who agreed to be mobilized, often by e-mail. Early efforts have been successful at registering members and mobilizing them to vote for the Democratic Party. Working America has not yet tried to mobilize its members for other projects. It does not arrange face-to-face meetings among its members. Working America is directed

13. Howard Wial, *The Emerging Organizational Structure of Unionism in Low Wage Services*, 45 RUTGERS L. REV. 671 (1993). See also Casey Ichniowski & Jeffrey S. Zax, *Today's Associations, Tomorrow's Unions*, 43 INDUS. & LAB. REL. REV. 191, 192 (1990).

14. Wial, *supra* note 13, at 678-79, 698, 699 n.90.

15. See Snyder, *supra* note 6, at 590.

by the central AFL-CIO; it is not controlled by its members and does not function as a democratic organization.¹⁶

The Communication Workers of America (CWA) is an established union that represents workers at traditional telephone companies. CWA has set up two innovative projects to advance the interests of information professionals without representing them for purposes of collective bargaining. These have been described as “virtual unions.”¹⁷ The first is WashTech, which focuses on individuals working at Microsoft Corp. who are classified either as independent contractors or employees of temporary help agencies and thus are excluded, under Microsoft’s internal practices, from most Microsoft benefit plans.¹⁸ WashTech has lobbied in Washing-

16. Robert Fox, Address at the New York Law School Next Wave Organizing Symposium (Jan. 28, 2005).

17. Wayne J. Diamond & Richard B. Freeman, *Will Unionism Prosper in Cyber-Space?: The Promise of the Internet for Employee Organization* (Nat’l Bureau of Econ. Research, Working Paper No. 8483, 2001).

18. There is no formal legal relationship in the United States between employee status and participation in employer benefits plans. This point is frequently misunderstood. On the one hand, employers are certainly privileged to include independent contractors, and employees referred by temporary help agencies, in benefits plans. Similarly, status as a statutory “employee” does not automatically carry the right to participate in employer programs. Employers are normally privileged to create different classes of employees with different access to benefits programs. This point is demonstrated in the well-known, but generally misunderstood, litigation against Microsoft itself. The Internal Revenue Service determined that certain individuals working at Microsoft were statutory employees, for whom taxes should have been withheld. Microsoft did not challenge this reclassification. The employees then sued Microsoft, claiming that, as employees, they had a right to participate in numerous Microsoft benefit programs, such as health insurance, pensions, bonuses, and the self-directed investment plans known as 401(k) plans. It is rarely appreciated that they lost on every one of these claims except for one: as employees, they were entitled to participate in a very unusual stock purchase plan that by federal law must be open to all employees. *See Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997) (refusing to order inclusion in 401(k) plan but ordering inclusion in employee stock purchase plan organized under Internal Revenue Code § 423). Such plans were rarely used even before the *Vizcaino* decision and are unlikely to be encountered again. WashTech did not represent the plaintiff class in the *Vizcaino* litigation but thereafter took an active role in advising workers of their rights. Programs covered by the Employee Retirement Income Security Act (ERISA), including programs for retirement income and health insurance, are subject to its nondiscrimination rules, but these rules do not require equal treatment of employees. They are designed rather primarily to prevent sham benefits plans that benefit only top managers, and are shot full of exceptions. *See generally* Joseph Bankman, *The Effect of Anti-Discrimination Provisions on Rank-and-File Compensation*, 72 WASH. U. L.Q. 597 (1994).

ton State for changes in employment laws and offers classes in job training skills, such as computer programming. It has requested bargaining recognition from at least four temporary help agencies but had been unsuccessful before winning a card check at Cingular in Bothell, WA in November 2005.¹⁹ Like other organizations discussed in this article, it has many more individuals visiting its web page, and joining for specific action, than dues-paying members. In fact, there were only 460 members as of early 2005.²⁰ Alliance@IBM, another CWA affiliate, organizes among older IBM employees concerned about downsizing and retirement issues. It maintains a web site with information about pension rights and litigation involving IBM employees.²¹

The South Bay Labor Council, in San Jose, California, the metropolitan center of Silicon Valley, supports an innovative project that attempts to organize low-wage workers, particularly temporary and contingent workers. The South Bay Labor Council speaks for the workers but does not represent them in collective bargaining. Working Partnerships USA, the project, has done community organizing, lobbied for living wage legislation, public housing, and health insurance, and issued research reports.²² Perhaps its most innovative project, a union-run temporary help agency, did not suc-

19. Jeff Nachtigal, *Cingular Organizing Drive a Success!*, WASHTECH NEWS (WashTech/CWA, Seattle, Wash.), Nov. 18, 2005, http://www.washtech.org/news/labor/display.php?ID_Content=5023 ("The American Arbitration Association certified by card check Nov. 4 that a majority of the workers wanted CWA union recognition. They will be represented by WashTech/CWA Local 37083 in Seattle."). See also HYDE, *supra* note 4, at 178-79; Virginia L. DuRivage, *CWA's Organizing Strategies: Transforming Contract Jobs into Union Jobs*, in NONSTANDARD WORK: THE NATURE AND CHALLENGES OF CHANGING EMPLOYMENT ARRANGEMENTS 377 (Françoise Carré et al. eds., 2000); Steven Greenhouse, *Five Questions for Larry Cohen: Renewing a Union in the New Economy*, N.Y. TIMES, Dec. 24, 2000, at 4; Harry C. Katz, Rosemary Batt & Jeffrey H. Keefe, *The Revitalization of the CWA: Integrating Collective Bargaining, Political Action, and Organizing*, 56 INDUS. & LAB. REL. REV. 573 (2003).

20. *Various Issues Faced in Union Organizing Are Examined at AFL-CIO Conference*, 176 Lab. Rel. Rep. (BNA) 15, D-23 (Mar. 21, 2005) (citing Morton Bahr, President, Communications Workers of America, who estimates that WashTech has 17,000 e-mail subscribers and 460 dues-paying members).

21. HYDE, *supra* note 4, at 178-79. It is not difficult to foresee potential conflict between the young freelancers organized by WashTech and the older IBM employees organized by Alliance@IBM.

22. Barbara Byrd & Nar Rhee, *Building Power in the New Economy: The South Bay Labor Council*, http://www.laborstudies.wayne.edu/power/downloads/San_Jose.pdf (last visited Dec. 30, 2005).

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ceed.²³ Working Partnerships USA, a temporary help agency was designed to provide high-quality competition to the region's for-profit temporary help agencies, by emphasizing skills training and career development.²⁴ When I interviewed its president in October 2001 it was placing only forty or fifty individuals each week.²⁵

In some ways the most interesting AWO attempts self-consciously to form a movement for workers who are unquestionably defined as employees and could be represented through traditional union representation. Restaurant Opportunities Center New York (ROC-NY), was asked by Local 100, Hotel and Restaurant Employees (HERE), to start an independent organization to work with displaced workers after the destruction of the World Trade Center on September 11, 2001. ROC-NY was asked to coordinate social services for the surviving staff of the Windows on the World restaurant.²⁶ With charitable donations coming in, the union found it convenient for accounting and disclosure purposes to create a separate entity, organized, not as a labor organization, but as a charity. Such a nonunion structure soon proved potentially useful as an organizing vehicle, particularly after the hiring of executive director Saru Jayaraman, who formerly worked at the Workplace Project.²⁷

ROC-NY has now engaged in six successful organizing campaigns at groups of fancy "white tablecloth" restaurants in New York City. These campaigns have culminated in the signing of a con-

23. A telephone call on September 14, 2005 to Working Partnership staff confirmed that the program stopped running on December 31, 2003. *See also* Working Partnership USA, Projects, <http://www.wpusa.org/projects/index.pl> (last visited Nov. 28, 2005).

24. SUNDARI BARU, *WORKING ON THE MARGINS: CALIFORNIA'S GROWING TEMPORARY WORKFORCE* 31 (2001), available at <http://www.onlinecpi.org/pdf/CPI-TempWorkers.pdf> (stating that Silicon Valley employs employees of temporary help agencies at twice the national rate: about 3.53% of jobs in the Valley are with temporary help agencies).

25. HYDE, *supra* note 4, at 175-76.

26. An estimated 165,000 people work in New York City restaurants, of whom only 5% or so are members of the relevant locals of the Hotel and Restaurant Employees (HERE). *See* BEHIND THE KITCHEN DOOR: PERVASIVE INEQUALITY IN NEW YORK CITY'S THRIVING RESTAURANT INDUSTRY (Restaurant Opportunities Center of New York & New York City Industry Coalition 2005), http://www.rocnny.org/documents/RocNY_final_compiled.pdf.

27. *See* Kavita Kulkarni, Fighting for Justice: Organizing for Immigrant Workers' Rights, An Interview With Saru Jayaraman (Feb. 27, 2004), http://www.nyu.edu/gallatin/communitylearning/writings/infra_text_accompanying_notes_47-48 (discussing the Workplace Project).

tract, enforceable not as a collective bargaining agreement — since ROC-NY claims not to be a statutory “labor organization” — but as a contract under state law. The employers commit to increases in wages and benefits, settle claims of discrimination and failure to pay minimum wage or overtime, and pledge job security, including a pledge not to discharge employees without notice to ROC-NY.²⁸ These agreements have been signed following lengthy campaigns marked by public demonstrations, “dinner theater” performances by students who gain admission to the restaurant as patrons, and similar media events.²⁹

I asked Saru Jayaraman why, in light of this success, it was important for ROC-NY that it not be a “labor organization,” since these employers might well have recognized HERE as an exclusive representative. She mentioned three legal advantages that ROC-NY believes it gains from being a charity rather than a labor organization. First, ROC-NY does not service contracts. It does not expend resources on arbitrating grievances or owe a duty of fair representation. Second, the charity does not face the same limitations and restrictions that unions may face.³⁰ Third, ROC-NY opened the worker-owned restaurant COLORS in Greenwich Village in January 2006. Although unions have helped organize employee trusts to own companies, the legal picture is not entirely clear, and Jayaraman thinks that it is possible that an organization that is not a labor organization might have more freedom to own a business or facilitate such employee ownership.³¹ A possible drawback that

28. Steven Greenhouse, *Two Restaurants to Pay Workers \$164,000*, N.Y. TIMES, Jan. 12, 2005, at B3. A crucial moment in the growth of any AWO is its first appearance in an article by Steven Greenhouse in the *New York Times*. See, e.g., Steven Greenhouse, *Gristede's Deliverymen to Share in \$3.2 Million Wage Settlement*, N.Y. TIMES, Dec. 18, 2003, at B2; Steven Greenhouse, *Korean Grocers Agree to Double Pay and Improve Workplace Conditions*, N.Y. TIMES, Sept. 18, 2002, at B1. See Hyde, *supra* note 3.

29. Saru Jayaraman, Seminar Presentation at the Rutgers University School of Law (Apr. 5, 2005).

30. E.g., National Labor Relations Act §8(b)(7)(C), 29 U.S.C. §158(b)(7)(C) (2000) (restricting organizational picketing).

31. Interview with Saru Jayaraman, Executive Director, Restaurant Opportunities Center of N.Y., in Newark, N.J. (Apr. 5, 2005). I am reporting what Saru Jayaraman told me about why ROC-NY has attempted to be a charity, rather than a labor organization. I do not entirely agree with her analysis. There is no legal impediment to union involvement in employee ownership. See generally Alan Hyde & Craig Harnett Livingston, *Employee Takeovers*, 41 RUTGERS L. REV. 1131 (1987) (discussing union-led takeovers in

might offset the positive aspects of ROC-NY not being a labor organization might be that unions have greater freedom of political action under federal law than do charities.³² ROC-NY also litigates claims for restaurant workers under employment statutes, lobbies and advocates for restaurant workers, and provides classes on immigration rights and other subjects.

2. Employee Caucuses

Many large United States employers, otherwise nonunion, permit or even encourage caucuses in which African-American, Latino/a, Asian, female, or gay and lesbian employees meet to discuss common interests, assist the employer in recruiting or community efforts, and otherwise provide mutual support.³³ Such groups are known only when individual employers permit research about them. There is no data on how widespread they are and no formal definition of them.³⁴ These employee groups apparently restrict

the 1980s). I am also not as confident as she is that ROC-NY has achieved its goal of avoiding "labor organization" status. See *infra* text accompanying notes 85-89. Failure of a labor organization to file necessary reports is punishable with fines or a year in prison, Labor-Management Reporting and Disclosure Act (LMRDA) § 209, 29 U.S.C. § 439 (2000).

32. E-mail from Saru Jayaraman, Executive Director, ROC-NY, to Alan Hyde, Professor of Law, Rutgers University School of Law (Apr. 6, 2005) (on file with author).

33. HYDE, *supra* note 4, at 170-73; RAYMOND A. FRIEDMAN & DONNA CARTER, AFRICAN AMERICAN NETWORK GROUPS: THEIR IMPACT AND EFFECTIVENESS, AN EXECUTIVE LEADERSHIP COUNCIL STUDY (1993); Raymond A. Friedman, *Defining the Scope and Logic of Minority and Female Network Groups: Can Separation Enhance Integration?*, 14 REV. PERSONNEL & HUM. RESOURCE MGMT. 307 (1996).

34. Indeed, there is no common name. Raymond Friedman, the leading scholar of such groups, prefers "minority employee network group." See, e.g., Raymond A. Friedman & Kellina M. Craig, *Predicting Joining and Participating in Minority Employee Network Groups*, 44 INDUS. REL. 793 (2004). I normally reserve "network" for groups that transcend the boundaries of individual firms, in order to refer to the emerging economic literature revolving around the contrast between firms and networks. See, e.g., HARRISON C. WHITE, *MARKETS FROM NETWORKS: SOCIOECONOMIC MODELS OF PRODUCTION* (2002); Kenneth Arrow, *What Has Economics to Say About Racial Discrimination?*, 12 J. ECON. PERSP. 91, 98 (1998). I normally refer to "identity caucuses," which I believe to be the more commonly used term. See Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149 (1993), reprinted in *THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION* (Matthew W. Finkin ed., 1994). However, "caucus" potentially creates confusion with identity-based caucuses that function *within* labor unions. See the outstanding article by Ruben J. Garcia, *New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement*, 54 HASTINGS L.J. 79 (2002). I will not be discussing intra-union caucuses in this article.

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themselves to mutual support and assisting management. They rarely make any formal demands on management.³⁵ Indeed, an individual's participation in them is correlated with perceived gains from participation and a sense of group identity, but not with opposition to or dissatisfaction with the employer.³⁶ The extent to which group identity can overcome collective action problems for AWOs will be an important issue for AWOs throughout this paper and in future study. In general, as we shall see, group identity is crucial in overcoming collective action problems.

3. Benefits Provider: Working Today

Working Today,³⁷ based in New York City, is a membership organization not affiliated with any union. It aspires to become a movement or lobbying organization speaking for everyone who works. Its particular focus is on independent contractors, freelancers, frequent job-changers, part-time workers, and others who fall outside the model of work often assumed by employment law and labor unions. Its current strategy of organization, typical of worker organizations of the past two centuries, is to sell health insurance and other portable benefits as a way of building membership. When reviewed by Joni Hersch in 2003, the package appeared fairly expensive, offering little advantage over plans available directly from insurance companies.³⁸ "It remains to be seen whether a participatory or democratic employee organization will have any advantage over the private sector in the marketing of benefits such as health insurance. I cannot think of any practical or theoretical reason why it should."³⁹

35. The exception is that gay and lesbian caucuses normally request domestic partner benefits, but normally make no other formal demands on management. See Maureen Scully, *Managing the Legitimacy of Controversial Issues: The Role of Gay Employee Groups in the Adoption of Domestic Partner Benefits* (1997) (unpublished paper presented at the Industrial Relations Research Association Spring Meeting, New York, NY).

36. Friedman & Craig, *supra* note 34, at 798, 807, 808.

37. See Kelly & Tramontano, *supra* note 8; Working Today, About Us, <http://www.workingtoday.org/about/index.html> (last visited Dec. 30, 2005).

38. See Joni Hersch, *A Workers' Lobby to Provide Portable Benefits*, in EMERGING, *supra* note 5, at 225-26. See Working Today, Freelancers Union Benefits, <http://www.workingtoday.org/productsservices/products.php> (last visited Sept. 21, 2005) (now listing more reasonable plans on the organization's web site).

39. HYDE, *supra* note 4, at 179.

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4. Immigrants' Rights Organizations

Some organizations that provide services and advocacy for immigrant workers also speak for them on issues at work. Casa Mexico played a supporting role in attempts to organize employees of greengrocers in New York State, nearly all of whom are Mexican immigrants.⁴⁰ Its spokesperson, Jerry Dominguez, is normally identified as speaking also for Asociación Mexicano-Americano de Trabajadores (AMAT),⁴¹ an organization that stages "reactive protests" but does not formally represent workers in collective bargaining.⁴² The Immigrants Support Network (ISN) lobbies to protect the interest of workers in the United States under the H-1B visa program, which issues three-year visas for skilled professionals.⁴³ Since advocacy organizations of this type are not statutory labor organizations, they may and do (as in the case of ISN) receive support from employers. It is funded largely by successful Indian entrepreneurs, such as Kanwal Rekhi (formerly of Cybermedia and Novell), who derive no direct benefit from its success, but are largely motivated by pride in the achievements of their compatriots.⁴⁴

40. Casa Mexico was one of two worker representatives that signed a landmark agreement in 2002 in which greengrocers pledged to comply with applicable employment laws and received immunity from suits to recover past wages. The other worker representative was the state AFL-CIO. Neither worker representative had been designated by workers. See GREENGROCER CODE OF CONDUCT, http://www.oag.state.ny.us/workplace/final_ggcode_english_long.pdf (last visited Mar. 13, 2006). For contrasting views on the Greengrocer Code of Conduct, compare Matthew T. Bodie, *The Potential for State Labor Law: The New York Greengrocer Code of Conduct*, 21 HOFSTRA LAB. & EMP. L.J. 183 (2003) (cautiously hopeful) with Hyde, *supra* note 3, at 603-06 (critical). It has not proven difficult for journalists to find Mexican immigrants since the date of the agreement who work in a greengrocery for seventy-two hours, for which they are paid \$200, both violations of law. See Andrew Kennis, *Not All Greengrocer Workers Reap Fruits of Victory*, THE VILLAGER, April 7-13, 2004, at 12; Steven Greenhouse & Seth Kugel, *Labor Truce Wearing Thin for Koreans and Mexicans*, N.Y. TIMES, Sept. 27, 2004, at B3; *infra* Part II.B.7 "Government Bodies."

41. See Press Release, New York State Attorney General, Laundry to Reinstate Workers Illegally Fired for Cooperating with Investigation of Labor Exploitation (July 21, 2003), http://www.oag.state.ny.us/press/2003/jul/jul21a_03.html.

42. Victoria Malkin, *The New York Greengrocer Campaign: Immigrant Organizing in Ethnic Niches*, in SHARING INTEGRATION EXPERIENCES: INNOVATIVE COMMUNITY PRACTICES 44 (Aristide R. Zolberg & Alison Joy Clarkin eds., 2003), available at <http://www.newschool.edu/icmec/SharingIntExp.pdf>.

43. The modal holder of an H-1B visa is a computer programmer from India, according to the sole survey taken, in 2000. See HYDE, *supra* note 4, at 125-39, 176-78.

44. HYDE, *supra* note 4, at 125-39, 176-78.

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5. Immigrant Worker Centers⁴⁵

Another immigrants' advocacy organization deserves separate treatment because of the more intense level of participation it generates. At least 133 immigrant worker centers provide advocacy and social services targeted to workers of particular ethnic groups, in specific geographic communities. Examples just from Los Angeles include Korean Immigrant Workers Advocates (KIWA), Instituto de Educacion Popular del Sur de California (IDEPSCA), and Coalition for Human Immigrant Rights of Los Angeles (CHIRLA).⁴⁶ Another well-known center is the Workplace Project, aimed at Latin American immigrant workers on Long Island, New York, and discussed in a recent book by its founder.⁴⁷ While such centers draw on many historical antecedents in the long history of American assimilation of immigrants, a modern prototype is said to be the Lower East Side Worker Center, later Latino Worker Center, founded in New York City in 1993 by the Chinese Staff and Workers Association to assist Latino workers on formerly all-Chinese restaurant staffs.⁴⁸ While such centers vary, nearly all introduce members to social services; research and report on working conditions; lobby for legal changes; advocate with government agencies; build organizations, often in coalition with other groups; and offer classes integrated with organizing. Some provide legal services and sue employers. All occasionally advocate with employers on behalf of individual workers.⁴⁹

B. Nonmembership Organizations

As mentioned above, Freeman and Hersch distinguish "membership organizations" (such as Working America, the AFL-CIO

45. See Janice Fine, *Work Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. Sch. L. Rev. 417 (2005-2006); Naito, *supra* note 9.

46. See Fine, *supra* note 45. See JANICE FINE, *WORKER CENTERS ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* (2006).

47. See JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* (2005). See generally Fine, *supra* note 45; Naito, *supra* note 9.

48. See GORDON, *supra* note 47, at 81.

49. Fine, *supra* note 45. Such "dealing with employers" over grievances would presumably make most Worker Centers statutory "labor organizations" for purposes of section 2 of the NLRA, subsection 5. NLRA, 29 U.S.C. § 152(5) (defining "labor organization"). The issue does not appear to have been litigated. Legal issues will be further discussed in this article. See *infra* Part III.

membership affiliate) from “nonmember-based organizations.”⁵⁰ For them, the key to “nonmember-based organizations” is that “the agents or activists select groups of workers as their principals — a reversal of the relation in the standard principal-agent model in which the principals select the agents.”⁵¹

Although this distinction is helpful it is not entirely clear where the line is to be drawn when analyzing AWOs. The organizations discussed so far might easily be placed on either or both sides of the line. All enroll members and therefore are “membership organizations.” Yet all are organized primarily by activists who selected a group of workers as their principals (nonmembership organizations). The projects founded by labor unions, caucuses, Working Today, and immigrant support groups were all founded by activists who selected a group of employees for organization, but then enrolled a subset of them as members. In some cases, the activists direct the AWO with little direct control by the nominal members. None of these organizations are really spontaneous or organized by the workers themselves. Working America, the AFL-CIO affiliate, and Working Today, the benefits provider, are not even organized democratically. They hold no elections or meetings.

However, recent advocacy campaigns for low-wage, mainly immigrant service workers in the United States normally involve participation and advocacy by two groups that do not even purport to enroll workers as members: legal advocacy groups and units of the government.

6. Legal Advocacy Groups

Numerous legal advocacy groups provide representation on issues of employment law.⁵² Particularly prominent in recent organizing campaigns in New York are the National Employment Law

50. EMERGING, *supra* note 5, at 3.

51. *Id.*

52. See Christine Jolls, *The Role and Functioning of Public-Interest Legal Organizations in the Enforcement of the Employment Laws*, in EMERGING, *supra* note 5, at 141-76. As the title indicates, Jolls is primarily focused on the role of Public-Interest Legal Organizations in ensuring enforcement of existing laws, rather than the broader issues of social change or worker organization.

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Project (NELP),⁵³ civil rights advocacy groups such as Puerto Rican Legal Defense and Education Fund (PRLDEF), and the Immigrant Rights Clinic of the New York University School of Law.

NELP was founded to provide research and strategic support to local offices providing free legal assistance to poor people.⁵⁴ However, it also selects litigation on its own. For example, NELP provided legal representation to delivery personnel for New York City supermarkets and drug stores who were paid less than the legal minimum wage because they were wrongfully classified as self-employed independent contractors. The employers tried to justify this classification because the workers had been referred to them through a contracting agency.⁵⁵ While NELP does not usually conduct class action litigation — preferring instead to work with organizations and local legal services offices — it felt something had to be done for the delivery personnel, who had been rebuffed by the union representative of supermarket workers. The litigation ended with a finding that the delivery workers were employees, not independent contractors, jointly employed by the stores and the contractor, both of which were now liable for substantial back pay.⁵⁶

The PRLDEF has taken the lead in representing day laborers seeking the right to solicit work in Freehold, New Jersey.⁵⁷ This might appear to be a surprising role for PRLDEF, since Puerto Ricans are Americans and do not have immigration law problems.

53. See NELP, About Us, <http://www.nelp.org/about/index.cfm> (last visited Dec. 2, 2005). See also Leonardi, *supra* note 11.

54. See NELP, About Us, <http://www.nelp.org/about/index.cfm> (last visited Dec. 2, 2005).

55. *Ansoumana v. Gristede's Operating Corp.*, 255 F. Supp.2d 184 (S.D.N.Y. 2003). See also Leonardi, *supra* note 11 (discussing NELP's role in the Gristede's litigation). See Hyde, *supra* note 3, at 607-09.

56. Catherine Ruckelshaus, NELP, Seminar presentation at Rutgers University School of Law (Mar. 9, 2004). Representatives of that union, Local 338, Retail, Wholesale and Department Store Workers Union (RWDSU/UFCW), reportedly told the delivery workers, accurately, that it had not conducted an organizing campaign in over thirty years. As a result of the *Ansoumana* litigation, the delivery workers are now represented by Local 338, which negotiated an agreement giving them the legal minimum. See 255 F. Supp.2d at 187-88.

57. There have been many attempts by suburban communities to restrict massing by day laborers, and litigation challenging these attempts; a review is beyond the scope of this article.

Presumably PRLDEF's advocacy for immigrant day laborers partly reflects PLRDEF's strategy, announced on its web site, of "Promoting Justice for Latinos," and thus its political agenda internal to the Latino community.⁵⁸ Working "off the books," and being paid in cash for yard or construction work, is relatively rare in the United States, at least compared to the rest of the world.⁵⁹ In the United States, the employment contract is so flexible that there is little systematic advantage to the employer in avoiding formal employment. Such day labor is therefore normally assumed to be restricted to undocumented immigrants or underage workers working outside the labor regulations, though accurate data on "working off the books" or day laborers are by definition not available. The day laborers PRLDEF represents are mostly Latino, and so the work fits the larger goal of advocating for the community.

NYU's Immigrant Rights Clinic (NYU Clinic) is supervised by three professors, one of whom, Michael Wishnie, devotes essentially all his time to labor and employment issues particularly affecting low-wage immigrants.⁶⁰ The NYU Clinic has litigated to recover wages for individual workers and has also assisted groups like Domestic Workers United and Chinese Staff and Workers' Association in drafting employment legislation.⁶¹

58. Puerto Rican Legal Defense and Education Fund, <http://www.prldef.org> (last visited Feb. 17, 2006). This web site is the best source of information in the long Freehold day laborer litigation, recent developments in which have not been officially reported, see Puerto Rican Legal Defense and Education Fund, About Us, PRLDEF — Our History, <http://www.prldef.org/About/abouthousing.htm> (last visited Dec. 2, 2005).

59. By most measures, the United States is at low the end of countries in the size of its unreported economy, but there are some indications that the United States underground economy is growing. See generally Friedrich Schneider & Dominik H. Enste, *Shadow Economies: Size, Causes, and Consequences*, 38 J. ECON. LITERATURE 77, 102 (2000) (comparing the United States shadow economy to those of other countries).

60. See New York University Faculty Profiles, Michael Wishnie, <http://its.law.nyu.edu/faculty/profiles/index.cfm?fuseaction=cv.main&personID=20386> (last visited Jan. 25, 2005).

61. See New York University Law Clinics, <http://www.law.nyu.edu/clinics/year/immigrant/index.html> (last visited Jan. 25, 2005). Domestic Workers United is an advocacy group, spun off from Asian advocacy organizations with substantial funding from George Soros. See Hyde, *supra* note 3, at 610. Chinese Staff Workers Association, established in 1979, is a particularly long-lived worker representation project that advocates for Chinese (and other) workers in all industries. It is not affiliated with a union and is not a union itself. It has spun off the Lower East Side Workers Center. See Chinese Staff and Workers' Association, www.cswa.org (last visited Dec. 2, 2005).

7. Government Bodies

The idea of worker representation through a government agency smacks of corporatism or fascism, and would seem far from American practice or ideology.⁶² However, an account of current advocacy on behalf of low-wage immigrant service workers in New York City, at least, would be incomplete without recognition of the very active role of the office of the New York State Attorney General, as well as other governmental entities, and the way in which their interventions shift the incentives and strategies of other AWOs.

The current Attorney General of the State of New York, Eliot Spitzer, has actively used his office to challenge corporate fraud and other white-collar crimes that in the United States are often left to be prosecuted by the federal government.⁶³ He is an ambitious individual expected to be his party's candidate for Governor of New York State in 2006. Among his accomplishments is a bureau that is actively litigating violations of labor standards, particularly for low-wage, immigrant workers without other representation.⁶⁴ For example, his office brokered the agreement concerning employees of greengrocers, which is formally an agreement between two organizations of employers, the New York State AFL-CIO and Casa Mexico.⁶⁵ It also participated in the litigation to classify delivery personnel for supermarkets and drug stores as employees, and to recover back wages for them.⁶⁶

The presence of such a governmental advocate is certainly an enormous benefit to low-wage workers in New York State. It speaks volumes about New York's politics that an ambitious politician could see political advantages in advocating for undocumented

62. See generally James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 AM. J. CORP. L. 747 (1991).

63. See, e.g., Jonathan R. Macey, *Wall Street in Turmoil: Who is protecting the Investor?: State-Federal Relations Post-Elliott Spitzer*, 70 BROOK. L. REV. 117, 126 (2004).

64. See, e.g., Steven Greenhouse, *Waging War, from Wall Street to Corner Grocery: Beyond the High-Profile Cases, Spitzer Helps Low-Wage Workers*, N.Y. TIMES, Jan. 21, 2004, at B1.

65. See Press Release, Office of New York State Attorney General Eliot Spitzer (Aug. 30, 2000), http://www.oag.state.ny.us/press/2000/aug/aug30a_00.html. See also GREENGROCER CODE OF CONDUCT, *supra* note 40.

66. *Ansoumana*, 255 F. Supp.2d 184.

workers, rather than persecuting them.⁶⁷ It would be better if low-wage workers elsewhere in the United States had such vigorous governmental advocacy. Nevertheless, the presence of the Attorney General alters the incentives of other advocacy organizations in ways that I have explored elsewhere.⁶⁸ Other organizations can demonstrate their efficacy and legitimacy by teaming with the Attorney General to recover economic benefits for workers. The Attorney General has incentives to produce settlements that transfer interesting sums of money to poor people and will garner favorable publicity. However, he and his office have no incentive to institutionalize continuing representation for the workers. At the end of the two campaigns mentioned, the greengrocer workers were left with no formal representation, while the supermarket deliverers are represented by a union that has not pursued back claims of wages and has negotiated a collective bargaining agreement that pays just the minimum wage.

Similarly, an advocacy campaign on behalf of domestic workers resulted in legislation of questionable efficacy, and no advance in representation for those workers. The New York City Council enacted a local law in June 2003 requiring employment agencies to give domestic workers referred for employment, and their employers, job descriptions and statements of the rights of employees.⁶⁹ Domestic Workers United, and its allies in the NYU Clinic, gained experience in legislative advocacy that may pay off in the future, but

67. Similarly, a successful legislative campaign by the Workplace Project to increase penalties for violations of wage and hour law attracted support from Republican state legislators, despite, or rather due to, open and vigorous advocacy by immigrants not even documented to work.

[W]hen [Workplace Project members], as immigrants, spoke of what they had suffered at the hands of unscrupulous employers while trying to make a better life for their families, they challenged the senators' conception of these new, brown, Spanish-speaking immigrants as takers. They sounded surprisingly like forebears. It was hard for the senators to separate *these* immigrants, sitting before them with dignity and talking about their struggle to be paid for their labor, from their own families and their experience of building a life in the United States.

GORDON, *supra* note 47, at 266-67. Most Republican legislators from the New York suburbs are children or grandchildren of immigrants. *Id.* at 265.

68. Hyde, *supra* note 3.

69. NEW YORK, N.Y., 20 ADMIN. CODE ch. 5, § 20-770-75 (2003), available at <http://webdocs.nycouncil.info/textfiles/Int%200096-2002.htm?CFID=1078460&CFTOKEN=21668336>.

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did not acquire any representational rights. It is not even clear that domestic workers are protected against discharge for affiliation with Domestic Workers United or any other advocacy organization.⁷⁰ The city council gained whatever favorable publicity resulted from its association with the workers, but the workers gained little tangible benefit. The biggest weakness, in my view, of AWOs is their common inability to achieve benefits for workers without the intervention of governmental agencies, which in turn lack any commitment to more effective organization.

C. *Inchoate Organization*

8. Internet and Intranet Protest

Finally, the United States has enough experience with electronic protest by employees to permit inclusion of Internet and Intranet-based protest as an eighth AWO; indeed, it is the only AWO available to most well-paid professionals. Such protests have been quite effective in defending existing benefits, but have not produced permanent organization and show no signs of doing so. Employees at Apple Computer who protested on the firm's internal e-mail system were successful in forcing the company president to defend, and then rescind, a change in the policy on bonuses. However, their subsequent attempts to create a permanent organization were ineffective.⁷¹ Similar employee protest forced changes in pension policy at IBM and Bell Atlantic.⁷²

III. LEGAL FRAMEWORK FOR REGULATING AWOs

The AWOs discussed in Part II have not yet presented any difficult legal issues. United States labor law is generally flexible, certainly as to questions of organizational form, and this flexibility

70. Domestic workers are expressly excluded from the National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (excluding from the definition of "employee" "any individual . . . in the domestic service of any family or person at his home"). States are presumably free to regulate their labor relations and protect them against retaliation, on the model of agricultural workers. See *United Farm Workers v. Ariz. Agric. Employment Relations Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982).

71. Libby Bishop & David I. Levine, *Computer-Mediated Communication as Employee Voice: A Case Study*, 52 *INDUS. & LAB. REL. REV.* 213 (1999).

72. Virginia Munger Kahn, *The Electronic Rank and File*, *N.Y. TIMES*, Mar. 8, 2000, at G1.

permits AWOs to organize and act.⁷³ In order to grasp their legal rights and privileges, it is important to keep separate three key concepts of United States labor law that are often confused:

- Employee concerted activity for mutual aid or protection, regulated under section 7 of the National Labor Relations Act⁷⁴
- Labor organization, regulated under section 2(5) of the National Labor Relations Act⁷⁵
- Exclusive representative, regulated under section 9(a) of the National Labor Relations Act⁷⁶

All but one of the AWOs discussed in Part II represent “concerted activity” by employees protected by §7.⁷⁷ Employees who participate in the AWOs are thus protected against employer retaliation, and their organizations are entitled to whatever rights and

73. For fuller discussions, see Hyde, *supra* note 34; Alan Hyde et al., *After Smyrna: Rights and Powers of Unions that Represent Less than a Majority*, 45 RUTGERS L. REV. 637 (1993).

74. National Labor Relations Act (NLRA) § 7, 29 U.S.C. § 157 (2000).

75. NLRA § 2(5), 29 U.S.C. § 152(5):

The term “labor organization” means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Curiously, “union” or “labor union” are not terms of art in United States labor law.

76. NLRA § 9(a), 29 U.S.C. § 159(a):

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

77. The sole exception is Domestic Workers United, or other organizations of domestic workers, as they are specifically excluded from the NLRA’s definition of employee, NLRA § 2(3), 29 U.S.C. § 152(3). Other workers excluded from the NLRA are agricultural laborers; individuals employed by parents or spouses; independent contractors; supervisors; and individuals subject to the Railway Labor Act, 45 U.S.C. §151, that is, employees of railroads, some express companies, and airlines. By contrast, immigrants not legally able to work in the United States *are* statutory employees for purposes of the NLRA. Discharge of them for union activities is illegal; however the remedial powers of the NLRB are limited. *See Hoffman Plastic Compounds Inc. v. NLRB*, 535 U.S. 137 (2002) (holding the Board may not award back pay to undocumented workers); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (holding the Board may not order reinstatement to employees that are not permitted by law to be employed in the United States).

privileges the employer grants to favored groups. Some AWOs are statutory “labor organizations” under section 2(5), and some are not. This status is relevant only in determining whether they are liable for the commission of unfair labor practices, whether an employer has improperly contributed to or supported them, or whether they must file financial disclosure forms or observe democratic organization. None has yet sought to be an “exclusive representative.” Their activities thus do not preclude other organizations from representing and organizing workers.

A. *Concerted Activity Under Section 7.*

Section 7 protects certain employee activity against employer discrimination, retaliation, interference, restraint, or coercion.⁷⁸ It does not require formal organization or inchoate organization. For example, it protects a group of employees who, to protest working conditions, left an unheated machine shop that they regarded as too cold.⁷⁹ While some assertions of rights by individuals acting alone are not protected,⁸⁰ an individual’s sarcastic e-mails on a company’s internal e-mail system, alerting other employees to the negative consequences of proposed changes in vacation policy, were protected against employer discipline.⁸¹

It thus appears uncontroversial that all the activity of AWOs referred to in Part II, other than Domestic Workers United, constitute protected concerted activity, including the e-mail protests at Apple, IBM, and AT&T, and the organizations largely targeted at undocumented immigrant workers. Employees may not be disciplined for participating in them. Moreover, employers that grant privileges to a favored employee organization must grant equivalent

78. NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1). Labor unions also may not coerce employees in the exercise of such activity, NLRA § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A), although this has not been a problem with the AWOs discussed in this article.

79. *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 12 (1962) (“One of these workers, testifying before the Board, summarized their entire discussion this way: ‘And we had all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way.’”).

80. See *Meyers Indus., Inc.*, 281 NLRB 882 (1986) (holding an individual complaint of unsafe equipment not specifically seeking to initiate group action is not protected activity), *aff’d sub nom.* *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

81. See *Timekeeping Sys., Inc.*, 323 NLRB 244 (1997).

privileges to other employee concerted activity, whether or not that activity is conducted through a formal "labor organization."⁸²

The National Labor Relations Board (the "Board") does not normally order an employer to meet with any organization representing some of its employees, unless and until that group represents a majority of the workforce in an appropriate unit.⁸³ A strike or other concerted activity by employees, however, seeking to get the employer to deal with their non-majority organization, is clearly protected against employer retaliation.⁸⁴

B. Labor Organization Under Section 2(5)

As Saru Jayaraman correctly noted,⁸⁵ there is little advantage to an AWO in being classified as a statutory labor organization, and some disadvantage: potential liability for unfair labor practices,⁸⁶

82. *NLRB v. Ne. Univ.*, 601 F.2d 1208, 1216-17 (1st Cir. 1979) (holding that an employer that grants facilities to a favored group must extend the same privileges to 9 to 5 employees, an employee group that the court held was not a statutory labor organization).

83. *Mooresville Cotton Mills*, 2 N.L.R.B. 952, 955 (1937), *modified and enforced*, 94 F.2d 61 (4th Cir.), *modified*, 97 F.2d 959 (1938), *modified and enforced*, 110 F.2d 179 (1940); *Pennypower Shopping News*, 244 N.L.R.B. 536, 537 n.4 (1974). Indeed, an employer is also privileged to refuse to meet with a *majority* representative unless and until that representative can demonstrate its majority in a Board election, *Linden Lumber Div., Sumner & Co. v. NLRB*, 419 U.S. 301 (1974). For a critique of this doctrine as untrue to the legislative history of the NLRA, see CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* (2004). At least one case found an employer to have violated section 8(a)(1) in refusing to entertain grievances from a nonmajority group, where the majority representative had collapsed and the employer's only reason for refusing to hear grievances from the nonmajority rival was disapproval of its union affiliation. *NLRB v. Lundy Mfg. Corp.*, 316 F.2d 921 (2d Cir. 1963) (Friendly, J.), *cert. denied*, 375 U.S. 895 (1963).

84. See *Union-Buffalo Mills Co.*, 58 N.L.R.B. 384 (1944); *Cleveland Chair Co.*, 1 N.L.R.B. 892 (1936); *Pennypower Shopping News*, 244 N.L.R.B. 536, 537 (1974).

85. *Supra* text accompanying notes 30-31.

86. NLRA § 8(b), 29 U.S.C. § 158(b) (unfair labor practices that can be committed only by a labor organization or its agents).

reporting and disclosure obligations,⁸⁷ inability to receive employer funds,⁸⁸ and obligations to observe democratic practices.⁸⁹

It is very difficult to generalize about which AWOs are statutory labor organizations. The relevant law has been shaped in an entirely different context. Most of the cases construing that definition apply the ban on employer support. These cases proscribe employer support for any organization that “deals with” employers through dialog that falls short of formal bargaining,⁹⁰ while excluding some cooperative or informal management communication devices.⁹¹

Exploration of this area of law, amply treated elsewhere, seems unhelpful in determining the rather different policy questions of when or whether groups like the Workplace Project, ROC-NY, or

87. Labor-Management Reporting and Disclosure Act (LMRDA) § 201, 29 U.S.C. § 431 (2000). LMRDA § 3(i), 29 U.S.C. § 402(i) (1959). The definition of labor organization for the Reporting and Disclosure Act is expressly broader than the definition under the NLRA. It includes, in addition to all NLRA labor organizations, “any conference, general committee, joint or system board, or joint council” intermediate in union structure, even when those bodies do not deal with employers and thus are not labor organizations for purposes of the NLRA.

88. NLRA § 8(a)(2), 29 U.S.C. § 158(a)(2) (making it an unfair labor practice for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.” Some of the AWOs discussed in Part I do receive such employer financial support, including identity caucuses and the Immigrants Support Network).

89. LMRDA §§ 101-105, 401-504, 29 U.S.C. §§ 411-415, 481-504. Some of the AWOs discussed in Part II do not observe democratic or participatory forms at all, such as Working America and Working Today. It is not clear how democratic WashTech and Alliance@IBM are. Other AWOs, while probably generally democratic, might well find it onerous to comply with such specific requirements of the LMRDA as secret ballots every three years. *See* LMRDA § 401(b), 29 U.S.C. § 481(b) (local labor organizations); formal procedures for removal of officers, § 401(h), 29 U.S.C. § 481(h); or continuing obligations to inform members of their rights under the LMRDA, § 105, 29 U.S.C. § 415. *See also* Thomas v. Grand Lodge of Int’l Ass’n of Machinists & Aerospace Workers, 201 F.3d 517 (4th Cir. 2000) (construing union’s obligations under the LMRDA section requiring labor organizations to inform members concerning the provisions of the LMRDA).

90. *See* NLRB v. Cabot Carbon Co., 360 U.S. 203 (1958) (explaining “dealing with” employer is broader than bargaining and includes making suggestions); *Electromation, Inc.*, 309 N.L.R.B. 990 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994) (holding that Action Committees alert management to areas of employee discontent and “deal with” employer).

91. *See* E.I. DuPont de Nemours & Co., 311 N.L.R.B. 893, 899 (1993) (holding that conferences and meetings that solicit employee suggestions are not labor organizations). The line is elusive; the law review literature enormous.

Immigrants Support Network should have to disclose their finances or be liable for unfair labor practices. In the cases involving employer support, the employer has a privilege to communicate with employees. The existence of this privilege might be a reason to construe "labor organization" narrowly. By contrast, it is difficult to identify any privilege in employee organizations to operate free of disclosure rules or unfair labor practice liability, merely because they understandably find it convenient to do so.

Some of the AWOs are almost certainly not statutory labor organizations, because they never "deal with" employers. Examples are Working America, the AFL-CIO membership affiliate; Immigrants Support Network, the lobbying group; and Working Today, the benefits provider. WashTech and Alliance@IBM similarly do not yet appear to deal with Microsoft or IBM respectively. The Internet protests are also probably not statutory labor organizations, because they are probably not organizations at all.

Identity caucuses, like African-American or gay and lesbian caucuses, present a more difficult legal issue. These groups do interact with an employer, in the sense of making suggestions about recruiting or taking on recruiting tasks. They rarely make formal demands. They normally do receive some financial support from employers, which would be illegal for a labor organization. While no precedent speaks to the issue, the Board, as mentioned, maintains that purely communicative bodies are not statutory labor organizations. Identity caucuses might exemplify this category better than employee meetings.

In my opinion, worker centers like the Workplace Project, and worker groups like ROC-NY, are quite likely to be statutory labor organizations. They do indeed raise grievances with particular employers on behalf of particular employees. Even if this is not collective bargaining, it is similar to activity that has been held to constitute the activity of dealing with employers. Moreover, it is hard to come up with any compelling policy reason why such groups should be exempt from disclosure requirements, or restrictions such as the thirty-day limit on organizational picketing that bind more traditional unions.

The Board has held, although not recently, that some labor-community alliances⁹² or labor advocacy groups⁹³ are not statutory labor organizations. Since these groups normally do “deal with” employers over individual employee grievances, the logic of these Board decisions is not obvious, and is likely to come under pressure over the next few years.⁹⁴

C. Exclusive Representation Under Section 9(a)

A labor organization that represents a majority of the workforce in an appropriate unit becomes the exclusive representative of the workforce.⁹⁵ The employer may treat with no other organization and commits an unfair labor practice in doing so, or in dealing directly with employees.⁹⁶ Such exclusive representation allows an organization the unique privilege to negotiate an agreement requiring all employees to pay union dues.⁹⁷ However, it also owes all employees in the unit a duty of fair representation as to negotiation or grievance handling.⁹⁸ There are few other privileges attached to majority status.⁹⁹ In particular, non-majority employee organizations may normally seek and obtain voluntary recognition for their members, present demands, conclude binding agreements, and conduct strikes and boycotts.¹⁰⁰ It is thus unlikely that

92. Center for United Labor Action, 219 N.L.R.B. 873, 873 (1975).

93. *Ne. Univ.*, 601 F.2d at 1216 n.9 (finding that 9 to 5 organization was not a labor organization).

94. For discussions and critiques of this area of NLRB law, see Marion Crain and Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767, 1789-91 (2001); James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889, 944-45 (1991).

95. NLRA § 9(a), 29 U.S.C. § 159(a).

96. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944) (citing *NLRB v. Jones & Laughlin Corp.*, 301 U.S. 1, 44 (1937)).

97. See NLRA § 8(a)(3)(i), 29 U.S.C. § 158(a)(3)(i).

98. See *Air Line Pilots Ass'n. v. O'Neill*, 499 U.S. 65 (1991); *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 202 (1944).

99. A certified majority union is privileged to use secondary boycotts to force the employer to recognize it. NLRA § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B). A majority union may insulate itself from challenge by signing a collective bargaining agreement; a non-majority union might face an NLRB election at any time. See MICHAEL C. HARPER, SAMUEL ESTREICHER & JOAN FLYNN, *LABOR LAW: CASES, MATERIALS, AND PROBLEMS* 428-30 (5th Ed. 2003).

100. Hyde et al., *After Smyrna*, *supra* note 73, at 638.

any of the AWOs will be tempted to seek to become an exclusive representative in the foreseeable future.

IV. THEORETICAL ISSUES RAISED BY ALTERNATIVE WORKER ORGANIZATIONS

While it is far too soon to reach very definite conclusions about AWOs, it is not too soon to begin to raise questions about their likely stability, achievements, and challenges to traditional labor law. The theoretical questions that follow are attempts to frame, and begin to answer, questions for activists, policy makers, and scholars. Are AWOs doomed to be such weak substitutes for traditional unions that the law should discourage them? Are AWOs so superior to unions that the law should specifically encourage them over unions? I think the answers to both those questions are "no." The following briefly identifies areas for further research that would help answer these policy questions.

A. *Do AWOs Face Collective Action Problems Distinct from Those Faced by Traditional Unions?*

Some of the early theoretical analysis of AWOs addressed their difficulty in mobilizing collective action, since rational workers would presumably choose to be free riders rather than make marginal contributions to collective action.¹⁰¹ This focus seems mistaken. While AWOs do face collective action problems, they are in no way different from the collective action problems faced by labor unions. While it is difficult for unions to overcome those collective action problems, their techniques for doing so are largely available to AWOs.

Unions cannot overcome collective action problems by appeals to economic rationality.¹⁰² They must persuade potential members and activists to redefine their interests. This has been described as the "two logics of collective action."¹⁰³ In order to motivate mem-

101. See, e.g., EMERGING, *supra* note 5; David Weil, *Individual Rights and Collective Agents: The Role of Old and New Workplace Institutions in the Regulation of Labor Markets*, in EMERGING, *supra* note 5, at 13.

102. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 88 (1971).

103. CLAUS OFFE, *DISORGANIZED CAPITALISM: CONTEMPORARY TRANSFORMATIONS OF WORK AND POLITICS* 170 (Claus Offe & John Keane eds., 1985).

bers, induce action, foster legislative change, or exist at all, any employee organization, including unions, must make emotional, affective appeals to motivate collective action. Such ideal or visionary appeals can construct collective identity and motivate action, where appeals to economic interest either actually failed, or would have failed.¹⁰⁴

Because AWOs are often organized as movements that organize workers through identities broader than “employee,” they may have certain advantages over unions in motivating the affective, ideal, “second” logic of collective action, and not just over issues of race or immigration. The three crucial factors in explaining participation in movements for social change are perceived injustice, perceived efficacy of group action, and an identity around which the group can form.¹⁰⁵ Unions in the United States have increasing difficulty in appealing to an identity, as such identities as “working class” or “union” lose appeal or even meaning.¹⁰⁶ By contrast, many of the successful AWOs grow out of, and further construct, such vital identities as “immigrant” or “domestic worker” and so on.

Obviously we are very far from a convincing social theory of the comparative roles of economic incentive and affective identity in constructing group action, or a theory of worker action comparing these factors. Many case studies await. In the current state of knowledge, however, there is no reason to assume unique collective action problems for AWOs.¹⁰⁷

104. Theoretical treatments include JON ELSTER, *THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER* (1989); CHARLES C. HECKSCHER, *THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION* 15-33 (1996); CLAU OFFE, *supra* note 103; Alan Hyde, *A Theory of Labor Legislation*, 38 *BUFF. L. REV.* 383 (1990). Case studies that attempt carefully to untangle economic from ideal appeals as motivators of action include RICK FANTASIA, *CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS* (1988); PETER SWENSON, *FAIR SHARES: UNIONS, PAY, AND POLITICS IN SWEDEN AND WEST GERMANY* (1989); Bert Klandermans, *Mobilization and Participation: Social-Psychological Expansions of Resource Mobilization Theory*, 49 *AM. SOC. REV.* 583 (1984); Staughton Lynd, *The Genesis of the Idea of a Community Right to Industrial Property in Youngstown and Pittsburgh, 1977-87*, 74 *J. AM. HIST.* 926 (1987); James Gray Pope, *Labor's Constitution of Freedom*, 106 *YALE L.J.* 941, 990-92 (1997).

105. Bert Klandermans, *How Group Identification Helps to Overcome the Dilemma of Collective Action*, 45 *AM. BEHAV. SCIENTIST* 887, 888 (2002).

106. See generally Sharon Rabin-Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause for Labor's Decline*, 16 *HOFSTRA LAB. & EMP. L.J.* 133 (1988).

107. Charles Heckscher once saw the future of labor organization as importantly linked to the model of, and alliance with, identity groups such as African American,

B. *Do AWOs Have Unique Difficulties in Projecting Power and Attaining Results?*

AWOs, like any other organization, have mixed records of success. Yet some of the successes are remarkable, particularly those

female, gay and lesbian, or Hispanic. HECKSCHER, *supra* note 104, at 68, 211, 274 n.1. He is now more skeptical. He notes that such groups are not “essentially focused on the world of work.” For them, “the workplace is just *one* venue for asserting universal rights. Thus they have not focused clearly on defining the kind of workplace that would meet their ideal of justice.” “Even more important, however, is the fact that identity movements have generally failed to sustain strong organizations; they have a significant tendency to fracture.” In contrast to older communities or even class identities:

The new identity movements, by contrast, are based around the deliberate “bringing to consciousness” of a sense of community that had been hidden, and a development of solidarity through ongoing participatory dialogue and self-criticism; they are thus in an important sense *intentionally unsettled*. Joshua Gamson has therefore raised the provocative question, “Must identity movements self-destruct?”: “Sexuality-based politics. . . contains a more general predicament of identity politics, whose workings and implications are not well understood: it is as liberating and sensible to demolish a collective identity as it is to establish one.”

Charles Heckscher, *Organizations, Movements, and Networks*, 50 N.Y.L. SCH. L. REV. 326 (2005-2006) (quoting Joshua Gamson, *Must Identity Movements Self-Destruct? A Queer Dilemma*, 42 SOC. PROB. 390, 402 (1995)).

Heckscher’s concerns are worthy of serious thought, but if one believes at all in the future of worker organization, one must regard identity politics as a force to be used, not as a threat: essentially all successful new *union* organizing in the United States in the past two decades has involved workers linked by, and organizing around, a shared ethnic or other group identity. I am thinking specifically of three of the numerically largest organizational victories of the 1990s: the organization of dry-wall workers, nearly all Mexican, in Los Angeles County, the largest such victory, see Ruth Milkman & Kent Wong, *Organizing the Wicked City: The 1992 Southern California Drywall Strike*, in ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 169-98 (Ruth Milkman ed., 2000); the Justice for Janitors Campaign of the Service Employees International Union, Christopher L. Erickson et al., *Justice for Janitors in Los Angeles and Beyond: A New Form of Unionism in the 21st Century?*, in THE CHANGING ROLE OF UNIONS: NEW FORMS OF REPRESENTATION (Phanindra W. Wunnavu ed., 2004); Jesús Martínez Saldaña, *At the Periphery of Democracy: The Binational Politics of Mexican Immigrants in Silicon Valley* (1993) (unpublished Ph.D. dissertation, University of California, Berkeley) (union using Mexican ethnic appeals); and the same union’s extraordinary campaign to organize home health care attendants in Los Angeles County, Karl Klare, *The Horizons of Transformative Labour and Employment Law*, in LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES 20-23 (Joanne Conaghan et al. eds., 2002).

As Heckscher’s quote from Gamson suggests, there may be a future for a group organized around the successive construction and smashing of identities. United States history suggests that this might be the fate of AWOs that currently organize immigrants and will live to see that identity smashed.

that would not have been predicted by existing economic models of group action.

How could the members of the Workplace Project, unable to speak English, vote, or legally work in the United States, persuade the New York Legislature to increase employer penalties for wage violations?¹⁰⁸ Why did Apple, IBM, and AT&T executives respond, then give in to, on-line employee protests when they were under no legal obligation to do so and employees threatened no economic harm?¹⁰⁹ The Apple case is particularly poignant.¹¹⁰ Employees, acting spontaneously on the company e-mail system, had a protest technique for forcing the company CEO to respond to their demands and ultimately give in, neither a privilege that attaches to unions. Yet they abandoned this effective AWO in search of permanent organization, which ultimately failed. “While these Apple employees were in no sense poor people, they would seem to represent another illustration of the thesis of [Frances F.] Piven and [Richard A.] Cloward (1977) that popular protest or insurgency often becomes ineffectual once organizers transform it into mass permanent organization.”¹¹¹

Again, we are far from a social theory of power in employee groups with limited organization. The issues concerning late-career employees in firms with internal labor markets (such as IBM or AT&T) need to be kept strictly separate from those concerning workers in high-velocity labor markets who can expect only short job tenures. The senior employees may successfully invoke the employer’s concern with morale that plays such a major role in empirical, as opposed to theoretical, labor economics.¹¹² By contrast, contingent employees are defined as such precisely because the employer achieves no gains from longevity. Thus no such rents are available for potential redistribution to employees. For them, disruption of the employers through demonstrations — like those conducted by ROC-NY or informal organizations of West African delivery personnel or Mexican greengrocer assistants — is probably

108. GORDON, *supra* note 47.

109. Bishop & Levine, *supra* note 71; Kahn, *supra* note 72, at G1.

110. Bishop & Levine, *supra* note 71.

111. HYDE, *supra* note 4, at 161 (citing FRANCES F. PIVEN & RICHARD A. CLOWARD, POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL (1977)).

112. See TRUMAN F. BEWLEY, WHY WAGES DON’T FALL DURING A RECESSION (1999).

the necessary first act to brokering a more permanent settlement; the second step needs to include institutional help.¹¹³ Again, however, AWOs are on balance probably superior to unions in their ability to carry out such disruption.

C. *Will the Alliances Necessary to the Growth of AWOs Impede their Effectiveness for Employees?*

I have argued elsewhere that making the alliances necessary for the growth of AWOs is the real problem that will be faced by the AWOs.¹¹⁴ To establish themselves among both donors and potential members they must achieve victories. Law can be seductive. Lawyers, law students, and especially government lawyers, can recover back wages or other legal victories. This is certainly a good thing if you are the worker who has been underpaid. Yet pressure by these actors for a quick financial settlement may result in weak organization for the workers, as in the case of the Greengrocer Agreement or the settlement of the delivery personnel litigation.

The problem of using law to build an organization is not a new one, and has been approached many ways in the history of legal services organization. Much of Jennifer Gordon's inspiring account of the Workplace Project is taken up with ever-changing attempts to use legal representation to build the organization.¹¹⁵ The relationship between law and building an AWO is particularly delicate, since it is far from clear what kinds of organizations need to be built. It seems premature to criticize law for assisting the "wrong kind" of organization, so long as it is not undermining organization altogether.

113. When the employer wants to retain protestors, like employees at Apple, IBM, or AT&T, employees may not need permanent organization. Employees may be best off with the technical means (e-mail or intranet) to stage periodic protests until their demands are met. When the employees are marginal and the employer has no interest in their longevity (greengrocer helpers, delivery personnel, and restaurant workers), demonstrations are never enough by themselves. Demonstrations are the first step at building a movement, but then allies are necessary to achieve gains. And for those workers, the gains should include some protection for their organization, since they cannot live on protests alone. Protection for their organization is precisely what was lacking in the greengrocer and delivery settlements, and where ROC-NY is achieving better results.

114. See Hyde, *supra* note 3.

115. See GORDON, *supra* note 47.

IV. CONCLUSION

While unions shrink, AWOs grow very slowly. It is far too soon to say whether any or all of these might enroll really large numbers of workers, or find a way of reaching a substantial group of workers who fall outside traditional unions. However, early indications are that movement-style organizing may help build worker organizations by overcoming collective action problems and projecting workers' voices. Fortunately, United States labor law is flexible on matters of organizational form. With the rise of AWOs, this flexibility will face major challenges over the next decade.

